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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 194.

MRS. ANNA L. GRAVES ET AL., PETITIONERS,

VS.

SPRINGFIELD GAS AND ELECTRIC COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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JURISDICTION.

Petitioners invoke the jurisdiction of this Court (Pet. 2)[1] "under the provisions of Sections 237(b) 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. Also Act of March 8, 1934, Title 28, Section 344(b) Judicial

[1]As used herein, "Pet." refers to "Petition for Writ of Certiorari to the Supreme Court of Missouri." "R." refers to the printed "Transcript of Record."

Procedure." Said Section 240 of the Judicial Code was Title 28, Section 344, so two of petitioner's citations are to the same statute. Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347) dealt only with review of judgments of Circuit Courts of Appeal and the Court of Appeals of the District of Columbia. In this case, petitioner seeks a writ of certiorari to review a judgment of the Supreme Court of Missouri, and Section 240 of the Judicial Code could have had no possible application.

However, both Sections 237 and 240 of the Judicial Code were repealed by the Act of June 25, 1948. Title 28, United States Code, Section 1257, presently governs review by this Court of final judgments of state courts.[2]

Under the heading of "Jurisdiction," petitioners assert [in an effort to bring their petition within Rule 38, Paragraph 5(a), of the Rules of this Court[3]] that the Supreme

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[2]"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Title 28, United States Code, Section 1257.

[3]"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 38, Pars. 5 and 5(a), Rules of Supreme Court of the United States.

Court of Missouri "has decided a federal question of substance not in accord with the applicable decisions of this Court."

However, as we believe will be apparent from the record and the opinion of the Supreme Court of Missouri, and as will be discussed *infra*, there has been and is no "federal question of substance" in this case, and the opinion of the Supreme Court of Missouri is not in conflict with the decisions of this Court.

STATEMENT OF THE CASE.

The opinion of the Supreme Court of Missouri (R. 164-172) contains a comprehensive review of the pertinent facts. This action was instituted on April 7, 1945, by Springfield Gas and Electric Company, a Missouri corporation (hereinafter called "the Springfield Company"), in the Circuit Court of Greene County, Missouri, a court of "exclusive original jurisdiction in all civil cases * * * not otherwise provided for by law" (Sec. 2100, R. S. Mo., 1939), for the purpose of obtaining under the Missouri Declaratory Judgment Act[4] a determination and declara-

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[4]"The circuit courts and courts of common pleas of this state, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Sec. 1126, R. S. Mo., 1939.

"Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute,

tion of the rights of the preferred stockholders of the Springfield Company upon "dissolution, liquidation or winding up of the corporation" (see plaintiff's "Amended Petition," R. 2-7).

Plaintiff-respondent has asserted that, under the dissolution provision in the Articles of Agreement of the Springfield Company (R. 47-48), the preferred stockholders of the Springfield Company are entitled to receive $100.00 per share. Certain of the preferred stockholders, petitioners herein, have contended that, under the call provision in said Articles of Agreement (R. 46), they are entitled to receive $115.00 per share.

From 1927 to March 26, 1945, the Springfield Company owned and operated certain utility properties in and adjacent to the City of Springfield, Missouri. *"The Springfield Company has been at all times an operating company and has never been a utility holding company within the meaning of the Public Utility Holding Company Act of 1935"* (Par. 11, R. 53).

Prior to March 26, 1945, the Springfield Company was a subsidiary of Federal Light and Traction Company (hereinafter called "Federal"), which, in turn, was controlled by Cities Service Power & Light Company. Both Federal and Cities Service were registered holding companies under the Holding Company Act (Pars. 13-14, R. 54).

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ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." Sec. 1127, R. S. Mo., 1939.

"The enumeration in Sections 1127, 1128 and 1129 does not limit or restrict the exercise of the general powers conferred in Section 1126, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." Sec. 1130, R. S. Mo., 1939.

In a proceeding then pending before the Securities and Exchange Commission (hereinafter called "SEC"), styled *"In the Matter of Cities Service Power & Light Company and Its Subsidiary Companies, Respondents,"* a proceeding to bring about compliance with the provisions of Section 11(b)(1) of the Holding Company Act [15 U. S. C. A., Sec. 79k(b)(1)], SEC ordered, among other things, under date of August 17, 1943 (R. 55):

> "It Is Ordered that Federal Light & Traction Company shall sever its relationship with the companies named hereafter by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules and Regulations promulgated thereunder, of its direct and indirect ownership, control, and holding of securities issued and properties owned, controlled, or operated by the following companies: Springfield Gas and Electric Company (and other companies named)."

In the "Findings and Opinion" handed down with the quoted order, SEC stated, among other things (R. 56):

> "Sale is only one of the many means of divestiture which may be used in compliance with orders of disposition."

On September 14, 1944, Federal and the City entered into a written contract (hereinafter called "the sale agreement") providing, generally speaking, for purchase by the City of the Springfield Company with its properties as existing on July 31, 1944 (Ex. B; R. 74-81). The City was to obtain, and subsequently did obtain, the required funds by issuance of revenue bonds which were validated by the Supreme Court of Missouri in *City of Springfield* v. *Monday*, 353 Mo. 981, 185 S. W. 2d 788.

On the closing date under the sale agreement, *i. e.*, on March 26, 1945, all of the 50,000 shares of the common stock of the Springfield Company were assigned, transferred and delivered to the City, and the stock was immediately reissued to the City (Par. 25, R. 59). Thereafter, at a special meeting of the Board of Directors of the Springfield Company on March 26, 1945, the old directors resigned and new directors, all of whom were officials of the City, were elected and qualified (Ex. D; R. 85-90).

Thereafter, on the same date, corporate dissolution of the Springfield Company was authorized and directed at special meetings of the Board of Directors and stockholders (Exs. E and F; R. 90-93), and appropriate provision was made for redemption of outstanding bonds, retirement of preferred stock, and conveyance of the properties of the Springfield Company to the City (Ex. G; R. 96-103). On the same date, the Springfield Company, the City, Federal and the First National Bank of Kansas City (as escrow agent) entered into an escrow agreement under which $169,290.00 was deposited with the escrow agent, that being the equivalent of $15.00 per share upon the outstanding 11,286 shares of preferred stock of the Springfield Company (Ex. H; R. 103-107).

The Board of Directors of the Springfield Company (then officials of the City) authorized and directed institution of this action for declaratory judgment on April 7, 1945 (Ex. K; R. 117-120).

It was stipulated that "Federal sold the common stock of the Springfield Company to the City, in order to enable Federal to comply with the order of SEC" hereinbefore quoted (Par. 38, R. 62). It was agreed also that (Par. 22, R. 57-58):

"No declaration or application for approval of the contract between Federal and the City, dated September 14, 1944, * * *, or for approval of the proposed sale of the common stock of the Springfield Company thereunder, was filed with SEC at any time, no such declaration or application for approval being necessary by reason of the exemption granted by Rule U-44(b)(3) of the General Rules and Regulations of SEC."

The sale agreement between Federal and the City (Ex. B; R. 74-81) was never presented to or considered by SEC; and, SEC made no order or finding with respect to the sale by Federal to the City, the corporate structure of the Springfield Company, liquidation or dissolution of the Springfield Company, retirement of its preferred stock, or the "investment value" of such preferred stock. Furthermore, the record in this case does not indicate whether either Cities Service or Federal ever filed a plan under Section 11(e) of the Holding Company Act [15 U. S. C. A., Sec. 79k(e)]; or, if such plan was filed, what its provisions may have been or what action SEC may have taken with respect thereto. And, as the Supreme Court of Missouri pointed out, the record reflects no objection or complaint about the order of SEC entered on August 17, 1943 (R. 55), which was directed to Federal only, and which required Federal to "sever its relationship with (Springfield Gas and Electric Company) by disposing or causing the disposition, *in any appropriate manner* * * * of its direct and indirect ownership, control, and holding of securities issued and properties owned, controlled, or operated" by the Springfield Company (italics ours).

There is no evidence in the record concerning "the investment value" of the preferred stock of the Spring-

field Company at any given time, or concerning the market history of the stock.

The Supreme Court of Missouri found that the preferred stockholders were entitled to $100.00 per share under the dissolution provision in the Articles of Agreement of the Springfield Company (R. 47), and ordered that a declaratory judgment to that effect be entered in the trial court.

ARGUMENT.

Before this Court will review a decision of a state court, it must affirmatively appear from the record that a federal question was presented to and decided by the state court, and that decision of the federal question was necessary to determination of the cause. *Williams* v. *Kaiser,* 323 U. S. 471, 477, 65 S. Ct. 363, 89 L. Ed. 398, 403; *Southwestern Bell Telephone Company* v. *Oklahoma,* 303 U. S. 206, 212, 58 S. Ct. 528, 530, 82 L. Ed. 751. Of course, we recognize that whether these jurisdictional requirements have been met is itself a federal question, which this Court will determine. *Honeyman* v. *Hanan,* 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 476. However, we are confident that an examination of the record in this case will impel the same conclusion reached by the Supreme Court of Missouri, *i. e.,* "that there is no question of a federal cause of action here involved" (R. 171).

Petitioners' position will best be apparent from an examination of the record. In their "Amended Answer and Counterclaim" (R. 9-25), defendants-petitioners advanced three separate and distinct theories upon which they sought to recover the call premium of $15.00 per share, to-wit:

1. That "there is an ambiguity between the winding up provision and the call provision in the said stock certificates and said articles of agreement," and that "on account of such ambiguity * * * the call provision and not the winding up provision, governs and controls the rights of the preferred stockholders" (Par. 7, R. 12). This "theory of ambiguity" was abandoned in the Supreme Court of Missouri.

2. "That *the City* became and was bound by the terms of said contract (the sale agreement) to withhold, and did withhold, a sum sufficient * * * to pay all of the holders of said preferred stock the sum of $115.00 per share"; "that the duty of *the City* to do so was definitely and finally fixed under the terms of said contract" (R. 17); that neither the City nor Federal nor the Springfield Company "was authorized to change or alter said contract without the knowledge and consent of the said preferred stockholders for whose use and benefit said contract was made with reference to the payment of said preferred stock"; but, "that notwithstanding the duty on the part of the said City under the sales contract to pay the said preferred stockholders $115.00 per share for said stock," the sum of $169,290.00 "was in fact unlawfully and without any authority placed in escrow by the said City of Springfield out of the purchase price which it had withheld to pay the said preferred stockholders under the terms of said contract" (R. 18). In other words, defendants-petitioners asserted that the sale agreement was made by Federal and the City for the express use and benefit of the preferred stockholders of the Springfield Company, and that they were entitled to recover as third-party beneficiaries. This was petitioners' so-called "state cause of action based on the provisions of the second paragraph of Exhibit B as made for their use and benefit" (R. 169). This theory was considered and ruled adversely to petitioners by the Supreme Court of Missouri (R. 171-172).

3. That "the question as to whether the sale of the properties under said contract to the City * * * is governed by the Federal Utility Holding Company Act, is a federal and not a state question, and * * * it has been directly held by the Supreme Court of the United States that said Act, and not the dissolution provision in the plaintiff's charter,

controls the rights of the preferred stockholders in the instant cause" (R. 23). It is significant that, when defendants-petitioners filed their "Amended Answer and Counterclaim" in the Circuit Court, they were of the opinion that, under their so-called "federal cause of action," "said stock is to be valued at its *fair and equitable value*," which they then averred to be $115.00 per share or more (R. 23). However, defendants-petitioners subsequently, but prior to determination of the case in the trial court, amended their "Amended Answer and Counterclaim," as to their so-called "federal cause of action," and alleged that the sale agreement "*by its express terms fixes and determines the value of the preferred stock at $115.00 per share*" (R. 130).

As stated in the opinion of the Supreme Court of Missouri, defendants there contended that they had "a federal cause of action based on the Public Utility Holding Company Act of 1935 *and Exhibit B* (the contract between Federal and City dated September 14, 1944)" (R. 169).

In their petition to this Court, petitioners have, for the first time, "expanded" this theory by asserting (Pet. 26-27) that they are entitled to the call premium under the escrow agreement also (Ex. H; R. 103-107), but it is still apparent that petitioners' so-called "federal cause of action" depends upon a contract alleged to have been made for their use and benefit as third-party beneficiaries, *i. e.*, either upon the sale agreement (Ex. B; R. 74-81) or upon the escrow agreement (Ex. H; R. 103-107).

We have searched the petition for writ of certiorari in a vain effort to find some statement of the federal question claimed to have been submitted to and decided by the Supreme Court of Missouri. The nearest approach to a statement of the alleged "federal question" appears to be the following (Pet. 13):

"The Missouri Supreme Court in the instant case has decided a federal question of substance not in accord with the applicable decisions of this Court. It has denied the preferred stockholders the call price of $115.00 per share, *as provided in Exhibit B* which is controlled by the Public Utility Holding Company Act of 1935, and not by the charter provision of the Springfield Company that was issued in 1927."

A somewhat similar statement appears under "Jurisdiction."[5] But, irrespective of the language in which petitioners may present their claim, the fundamental fact remains that, in the final analysis, petitioners are relying upon a contract, *i. e.*, either upon the sale agreement or upon the escrow agreement. That would seem to be plain from several statements in their petition.[6]

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[5]"The petitioners' claim is based on the sale * * * *of all of the common stock* of the Springfield Gas and Electric Company to enable the Federal * * * to comply with an order of the SEC Commission * * * resulting in the liquidation of the said Springfield Gas and Electric Company by applying thereto the charter provision of the Springfield Gas and Electric Company instead of Section 11(b)(2) of the Public Utility Holding Company Act of 1935, Title 15, Section 79k(b)(2), and denying to petitioners the title and right to $15.00 per share with interest specifically set up and claimed by the said petitioners under said Act" (Pet. 2).

[6]"* * * the overriding policy (of the Holding Company Act) required Federal to resort to the liquidation contract (Ex. B; R. 74-81) and pay the preferred stockholders the call price of $115.00 per share" (Pet. 18).

"This leaves only the provision for the payment of $15.00 per share to the preferred stockholders under the dissolution and liquidation contract, Exhibit H, the escrow agreement, and the Public Utility Holding Company Act of 1935" (Pet. 25).

"The preferred stockholders in the instant case are entitled as a matter of law to the call price, both under Section 2 of Exhibit B, as well as under the escrow agreement, Exhibit H" (Pet. 26).

"The call price controls * * * by reason of the fact that the liquidation contract adopts the call price as the value of the stock, both under Section 2 of Exhibit B, and the escrow agreement, Exhibit H" (Pet. 27).

It is apparent that petitioners recognize that, even under their so-called "federal cause of action," proof of the value of the preferred stock of the Springfield Company would be essential. There is no evidence in the record as to the "investment value" of the preferred stock. However, in the Supreme Court of Missouri, the theory of defendants-petitioners was that such proof of value was supplied by the sale agreement (Ex. B; R. 75); and, in their petition for writ of certiorari, their theory seems to be that such proof of value is supplied either by the sale agreement or by the escrow agreement (Ex. H; R. 105). In either event, petitioners' so-called "federal cause of action" would rest upon construction of a contract and would present no federal question.

Petitioners charge, no less than eleven times, that the City purchased from Federal the properties of the Springfield Company, and not its common stock. The record does not support petitioners. It is true that, as the Supreme Court of Missouri observed in the proceeding to validate revenue bonds (*City of Springfield* v. *Monday*, 353 Mo. 981, 185 S. W. 2d 788) the City "contracted with Federal to buy all of its stock in order to become the owner of its physical utility properties and is purchasing this stock solely to acquire them." However, although the City's ultimate purpose was acquisition of the properties of the Springfield Company, the fact remains that the City contracted to purchase, and did purchase, the common stock of the Springfield Company. The first transaction on the closing date under the sale agreement, *i. e.*, on March 26, 1945, was the transfer of the common stock of the Springfield Company from Federal to the City (R. 59, 84), and immediate reissuance of that stock to the City (R. 59). Federal did not participate thereafter in any action taken by the Springfield Company or by the City (Pars. 26-34, R. 59-61).

The parties stipulated in the trial court that "*Federal sold the common stock of the Springfield Company to the City*, in order to enable Federal to comply with the order of SEC * * * of August 17, 1943" (Par. 38, R. 62), and the record clearly shows that the common stock, and not the properties, of the Springfield Company was sold. Counsel for petitioners themselves admit that, if Federal sold the common stock of the Springfield Company to the City, the preferred stockholders would have no right to claim the call premium.[7]

However, it would be equally immaterial whether Federal had sold the common stock or the properties of the Springfield Company. Certain indisputable facts, which are reflected affirmatively by the record, demonstrate that petitioners could have no cause of action under the Holding Company Act. It stands admitted that SEC had no jurisdiction over the sale by Federal to the City, and that said transaction was never submitted to or considered by SEC (Par. 22, R. 57). When Federal sold and transferred the common stock of the Springfield Company to the City on March 26, 1945, the Springfield Company ceased to be an operating subsidiary of a registered holding company, and SEC thereafter did not have even indirect jurisdiction or control over the Springfield Company.

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[7] "If Federal had merely sold the stock of Springfield there would have been no dissolution either under the charter or the Public Utility Holding Company Act" (Pet. 17).

"If Federal had merely sold the stock it owned in the Springfield Company it would not have run afoul of the dissolution and liquidation under the Public Utility Holding Company Act * * *" (Pet. 18).

"Of course if the City had possessed the capacity to purchase the stock from Federal and had done so, the fact that the City had thereafter dissolved and liquidated the corporation would not bring Federal back into the transaction so that the liquidation would be governed by the Public Utility Holding Company Act" (Pet. 20).

SEC made no order pertaining to the corporate structure of the Springfield Company, its liquidation or dissolution, or retirement of its preferred stock. Likewise, SEC never undertook to fix, declare, determine or pass upon the "investment value" of the preferred stock of the Springfield Company, and no one sought any such determination of value by SEC. The order of SEC dated August 17, 1943 (R. 55), went no further than to direct Federal to "*sever its relationship* (with the Springfield Company) * * * *in any appropriate manner*," and SEC plainly stated (R. 56) that "sale is only one of the many means of divestiture which may be used in compliance with orders of disposition." Accordingly, Federal was not directed or required to sell either the common stock or the properties of the Springfield Company. Federal *might* have chosen to have "severed its relationship" with the Springfield Company by some other of "the many means of divestiture."[8] SEC made no order which, by the remotest stretch of imagination, could be said to have required retirement of the preferred stock of the Springfield Company at any time or at any price, either by Federal or by the City.

Furthermore, the sale agreement between Federal and the City did not require the City, after acquisition of the common stock from Federal, to dissolve the Springfield Company. That followed for another and entirely different reason, *i. e.*, because the City, although permitted to acquire the common stock of the Springfield Company to reach a desired end, could not operate a private corporation. However, by the sale agreement Federal did not undertake to liquidate or dissolve the Springfield

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[8]For example, the common stock of the Springfield Company might have been distributed by Federal as a dividend to its (Federal's) stockholders, which has been the method of divestment followed by a number of utility holding companies.

Company and assumed no obligation with respect thereto. The contract of September 14, 1944 (Ex. B; R. 74-81), to which petitioners now refer as "the liquidation contract" (R. 18, 27), "the dissolution and liquidation contract" (R. 25), or "the liquidation agreement" (R. 26), was nothing more nor less than a contract of sale or sale agreement. Counsel for defendants-petitioners were content to refer to the contract in the same manner in their "Amended Answer and Counterclaim" (R. 9-25).

The salient and controlling fact, as to petitioners' so-called "federal cause of action," is that there has been no proceeding under the Holding Company Act with respect to the corporate structure of the Springfield Company, its liquidation or dissolution, retirement of its preferred stock, or the "investment value" of such preferred stock, and that there has been no hearing before SEC, and therefore no finding by SEC, with respect to any of those matters. Petitioners rely principally upon two cases, *Otis & Co.* v. *SEC*, 323 U. S. 624, 89 L. Ed. 511, and *North American Co.* v. *SEC*, 327 U. S. 686, 90 L. Ed. 945. The distinctions between those cases and the instant case were pointed out in the opinion of the Supreme Court of Missouri (R. 170-171). In the Otis case, a plan for distribution of the assets of United Light and Power Company was submitted to SEC and was approved, as modified, after examination and hearing. Thereafter, SEC "directed counsel for the Commission to apply to an appropriate federal court for an order enforcing the Plan." 323 U. S. l. c. 627, 89 L. Ed. l. c. 516. SEC had found that the plan, as approved, was "fair and equitable" to all security holders. This finding was affirmed by the courts upon review in the manner provided in the Holding Company Act [15 U. S. C. A., Sec. 79k(e)].

In the *North American case, supra,* this Court was passing, for the first time, upon the constitutionality of Section 11(b)(1) of the Holding Company Act [15 U. S. C. A., Sec. 79k(b)(1)]. As the Court said, "Only these constitutional issues are now before us." 327 U. S. l. c. 690, 90 L. Ed. l. c. 950. Petitioners emphasize that the order of SEC dated August 17, 1943, directed to Federal (R. 55), and the order of divestment directed to North American Company were in almost identical language. However, counsel for petitioners conveniently ignore the fact that, in both the Otis and North American cases, the federal courts were considering, upon review as provided by the Holding Company Act, certain orders of SEC, the administrative agency vested with original jurisdiction under the Holding Company Act and charged by the Congress with the duty of making the investigation and determination contemplated by Sections 11(b)(1) and 11(b)(2) of the Act [15 U. S. C. A., Secs. 79k(b)(1) and 79k(b)(2)], whereas the instant case is an action for declaratory judgment instituted in a state court of original jurisdiction and does not involve review, either under Section 11(e) or under Section 24(a) [15 U. S. C. A., Sec. 79x(a)], of any order or finding by SEC.

Counsel for petitioners also cite, but significantly in incidental fashion, the very recent and exhaustive opinion by Mr. Justice Rutledge in *SEC* v. *Central-Illinois Securities Corporation,* 93 L. Ed. 1291 (June 27, 1949; Adv. Sheet No. 17). As in the *Otis* and *North American cases, supra,* the Central-Illinois case involved an amended plan filed under Section 11(e) of the Holding Company Act. The question was stated, in the first paragraph of the opinion (93 L. Ed. l. c. 1295), as "whether the Securities and Exchange Commission, in reviewing the plan, correctly applied the 'fair and equitable' standard of Section

11(e) in determining the amounts to be paid the preferred stockholders in satisfaction of their claims." The proceedings before SEC were reviewed at some length (93 L. Ed. l. c. 1296-1300), and the Court noted the character and scope of investigation made by SEC, the testimony offered, and the conclusions reached.

One of the major issues in the Central-Illinois case was as to the scope of review to be exercised by a district court in reviewing a plan theretofore submitted to and approved by SEC. This Court called attention (93 L. Ed. l. c. 1307) to the fact that an analogy drawn by the Court of Appeals "from the history of the law of reorganization in general is highly indiscriminate," in that "it ignores the important fact that in such proceedings there is no effort to brigade the administrative and judicial processes," as there is in proceedings instituted by SEC under the Holding Company Act. The Court's conclusion on the issue raised concerning the scope of judicial review[9] was that findings of SEC as to valuation "are not subject to reexamination by the Court unless they are not supported

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[9]"Indeed we think it is fair to conclude that the primary object of Section 11(e) [15 U. S. C. A., Sec. 79k(e)] was not to provide a highly different scope of judicial review from that afforded by Section 24(a) [15 U. S. C. A., Sec. 79x(a)], but was to enable the Commission, by giving it the authority to invoke the Court's power, to mobilize the judicial authority in carrying out the policies of the Act." *SEC* v. *Central-Illinois Securities Corp.*, 93 L. Ed. l. c. 1308.

"We do not think it [Sec. 11(e)] was intended to define with accuracy the scope of review to be exercised over matters committed to the Commission's discretion and expert judgment, not involving questions of law, or to set up a different and conflicting standard in those matters from the one to be applied in proceedings under Section 24(a)." *Ibid.*, l. c. 1308.

by substantial evidence or were not arrived at 'in accordance with legal standards.' "[10]

The doctrine of "equitable equivalents" first announced in the *Otis case, supra,* was recognized and reaffirmed in the Central-Illinois case. However, it would seem to be plainly apparent, from all of the reported cases as well as the Holding Company Act, that application of the doctrine of "equitable equivalents" must be confined to situations in which SEC, in the proper assumption of jurisdiction conferred under the Holding Company Act, has exercised its discretion and expert judgment and has made a finding as to "fair and equitable" value, "after notice and opportunity for hearing." In the case at bar, there was no finding by SEC as to the "investment value" of the preferred stock of the Springfield Company, and no order pertaining to such preferred stock.

Furthermore, Section 11(b)(2) of the Holding Company Act[11] specifically limits the authority of SEC to re-

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[10]"Accordingly we are unable to accept the conclusion of the Court of Appeals and the District Court that the latter was free in passing upon the Commission's valuations to disregard its judgment in the large areas of discretion committed by the Act to that judgment.

"Administrative finality is not, of course, applicable only to agency findings of 'fact' in the narrow, literal sense. The Commission's findings as to valuation, which are based upon judgment and prediction, as well as upon 'facts,' like the valuation findings of the Interstate Commerce Commission * * *, are not subject to re-examination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards.' " *Ibid.*, l. c. 1309.

[11]That portion of Section 11(b)(2) of the Holding Company Act thus limiting the authority of SEC is as follows:

"Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any com-

quire any change in the corporate structure or existence of any company which is not a holding company, "except for the purpose of fairly and equitably distributing voting power among the security holders of such company." As has been noted, the Springfield Company has never been a holding Company (Par. 11, R. 53); and, after sale of the common stock of the Springfield Company by Federal to the City, the Springfield Company was no longer a subsidiary of a holding company and SEC no longer had even indirect jurisdiction and control over the Springfield Company.

In the *Central-Illinois case, supra,* SEC determined the "investment value" of the preferred stock of Engineers Public Service Company, a registered holding company under the Act. In view of the limitation in Section 11(b)-(2) upon the authority of SEC as to any company which is not a holding company, it would seem that SEC would not have had jurisdiction to make any finding with respect to "investment value" of the preferred stock of the Springfield Company upon liquidation, dissolution or winding up of that corporation, *even if* such finding had been sought. However, it is unnecessary for us to speculate about what might or might not have been done by SEC. The plain, inescapable and indisputable fact in this case is that nothing was done by SEC with respect to the corporate structure of the Springfield Company, liquidation or dissolution of the Springfield Company, or retirement or valuation of its preferred stock.

Counsel for petitioners complain (Pet. 2) that the Springfield Company is being liquidated "by applying thereto the charter provision of the Springfield Gas and

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pany which is not a holding company, or of any company, whose principal business is that of a public-utility company." 15 U. S. C. A., Sec. 79k(b)(2).

Electric Company instead of Section 11(b)(2) of the Public Utility Holding Company Act." But, the Holding Company Act plainly contemplates and requires that whatever action may be taken under Section 11 thereof will follow "notice and opportunity for hearing" and thus will reflect "the Commission's expert judgment on the very technical and complicated matters to deal with which the Commission was established" (*SEC* v. *Central-Illinois Securities Corp.*, 93 L. Ed. l. c. 1307).

We submit that there is nothing in the Holding Company Act or in any of the cases which have arisen thereunder, including the Otis, North American and Central-Illinois cases, to justify or permit the conclusion, which petitioners seek to reach, that the Holding Company Act has invested the Circuit Court of Greene County, Missouri, in the first instance and as a matter of original jurisdiction, and the Supreme Court of Missouri upon appeal, with any jurisdiction, power or authority to fix, determine or pass upon the "investment value" of the preferred stock of the Springfield Company. In all of the reported opinions of federal courts in cases arising under the Holding Company Act, the initial action of SEC was being reviewed in the courts in orderly fashion and in the manner contemplated by the Congress and specifically provided in the Holding Company Act. During the period of more than four years since institution of this litigation, counsel for petitioners have cited no case, and we have found none, in which any state court has undertaken to cut across charter provisions, to apply "the doctrine of equitable equivalents," and to determine the "investment value" of stock under the Holding Company Act.

The petition for writ of certiorari abounds in immaterial, misleading and erroneous statements, apparently injected with the hope that some feeling might be engendered.

We will not prolong this discussion by attempting to single out and answer all of those misleading and erroneous statements, but certain of them perhaps should not be permitted to pass unchallenged. Counsel state (Pet. 23) that the sale agreement shows "that up to the date of closing that Federal was willing to retire the preferred stock at par and the additional call price of $15.00 per share." We respectfully submit that the sale agreement shows no such thing and justifies no such conclusion. Simple perusal of Paragraph Second of the sale agreement (R. 75) will show that stockholders of the Springfield Company, either common or preferred, are not mentioned as such. There is no statement in Paragraph Second about "the value" of the preferred stock of the Springfield Company, and there is no direction or agreement that either $100.00 per share or $115.00 per share should be paid to the preferred stockholders of the Springfield Company. In fact, Paragraph Second is altogether silent as to what the City should do with monies deducted.

In the preamble of the sale agreement, the parties evidenced a desire "to make provision for the contingencies connected with said offer" to purchase the Springfield Company (R. 74); and, as the Supreme Court of Missouri said (R. 172), "the parties to the contract had a right to protect themselves against the very contingency which arose, that is, the claim of certain preferred stockholders for the payment of a premium on their stock," which protection was afforded by deducting the sum of $169,290.00 and placing it in escrow pending termination of this litigation.

In at least four places (Pet. 3, 17, 18, 24), petitioners' counsel refer to Federal receiving "a windfall." Although Federal is not a party to this suit, we submit that to obtain what the Articles of Agreement provide upon dissolution,

liquidation and winding up of the Springfield Company is not to receive "a windfall." Furthermore, counsel well know that Federal also is being liquidated and that any monies which otherwise might have accrued to Federal upon termination of this litigation would pass to, and be distributed among, Federal's stockholders and their successors.

For similarly obscure and irrelevant reasons, petitioners refer at least four times (Pet. 7, 15, 19, 26) to the so-called Teed contract, dated April 22, 1949, which was terminated by agreement of the parties thereto (Pars. 18-21, R. 57). Obviously, the Teed contract could have no possible relevancy to the matter under discussion. It had nothing whatever to do with sale of the common stock of the Springfield Company by Federal to the City. Petitioners' counsel seem to infer that it should be considered as improper or reprehensible that Federal, as the owner of the common stock in the Springfield Company, representing the equity in the properties of that corporation, should have attempted to obtain the best available price for that common stock and the equity represented thereby.

However, such irrelevant comments by counsel do not supply the absent "federal question," which is a jurisdictional requirement for review by this Court. As counsel for petitioners finally admit at the close of their argument (Pet. 26) "the stockholders' rights are not based on a finding of the Commission but upon the liquidation agreement," or in the alternative, as suggested for the first time, upon the escrow agreement. Whether petitioners might recover as third-party beneficiaries under either of those contracts, certainly presents no federal question.

CONCLUSION.

We respectfully submit that, upon the stipulated facts in this record, no federal question was submitted to or decided by the Supreme Court of Missouri; that the opinion of the Supreme Court of Missouri, which petitioners would have this Court review, is not in conflict with the cited decisions of this Court; that the *Otis, North American* and *Central-Illinois cases, supra,* clearly are not applicable or controlling under the admitted facts in this record; and, that petition for writ of certiorari should be denied.

Respectfully submitted,

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